CURTESY IN THE UNITED STATES

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I. GENERAL CHARACTERISTICS

In England at common law a husband acquired upon marriage a right to the rents and profits, together with the use and enjoyment, of all the realty of which his wife was then seised and of which she thereafter became seised during coverture.¹ The interest which he thus acquired was known as an estate "by the marital right," or *iure uxoris*. It was a life interest, measured by the joint lives of husband and wife, which lasted until the dissolution of the marriage or until the birth of issue, but it entitled him to no rights in her lands after her death. Not until the birth of issue did the husband acquire rights which he might assert in his wife's lands if he survived her. If issue of the marriage, capable of inheriting her property, were born alive, he then acquired in her inheritable estates of which she had actual seisin an interest known as "curtesy initiate," a present estate measured by his life alone.² If he survived her, that interest became "consummate," and he was then said to be "tenant by the curtesy" during his lifetime.³ For most purposes there was no difference in the incidents of curtesy initiate and of curtesy consummate.⁴

Curtesy, therefore, was a life estate to which a husband was entitled upon the birth of issue in all his wife's lands of which she had been actually seised at any time during coverture, in fee simple or fee tail, and to which issue of the marriage could inherit, provided such issue

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3. Ibid.

4. The old authorities took the view that the wife's estate of inheritance was in the husband after birth of issue and that his life estate therein did not arise until the wife's death. See Farrer, Tenant By the Curtesy of England, 43 L.Q. Rev. 87, 93-94 (1927). Thus, if, after birth of issue, the husband made a feoffment in fee, there would be no forfeiture if he held by curtesy initiate; whereas, if his estate was by curtesy consummate, there would be forfeiture. Co. Litt. *30a. A further distinction may be noted in connection with divorce. See Mattocks v. Stearns, 9 Vt. 326 (1837).
had been born alive. The estate of curtesy which arose upon the birth of issue differed from the estate by the marital right in two respects: (1) it was an estate measured by the husband's life alone; (2) it attached only to the wife's estates which were capable of inheritance by issue of the marriage. Curtesy was an interest analogous to dower but differed from it in six principal respects: (1) curtesy entitled the husband to an estate in all the wife's inheritable freeholds, whereas dower entitled the widow to an interest in only one-third of the husband's; (2) actual seisin on the part of the wife was required for curtesy, whereas seisin in law was sufficient for dower; (3) curtesy attached to the wife's equitable as well as to her legal interests, whereas dower was confined to the husband's legal estates; (4) a requirement for curtesy was the birth of issue, whereas there was no such requirement for dower; (5) before the wife's death curtesy was a present estate, whereas dower was only a protected expectancy before the husband's death; (6) since curtesy attached to all the wife's lands, rather than to a fractional share, there was no necessity for assignment, as in the case of dower.

Curtesy made its appearance in the American colonies as early as the seventeenth century. Thereafter, with the gradual reception of the English common law which took place in the eighteenth and early nineteenth centuries, the principal features of common law curtesy became an accepted part of the law of marital estates in several of the original colonies and the first states. However, significant modifications of the common law requirements were made in the course of the nineteenth century. In several states, for example, the strictness of the rules with respect to the wife's actual seisin and the birth of issue were relaxed. The most important modification came about in the second half of the nineteenth century as a result of the so-called Married Women's Acts, giving a wife varying degrees of power to control and dispose of her property during marriage.

5. For the history of curtesy in England, see Haskins, Curtesy at Common Law, 29 B.U.L. Rev. 228 (1949).
6. Thus, curtesy attached to the wife's estates in fee simple, in fee tail general and (if he were the spouse named) in fee tail special. Littleton, Tenures § 35.
7. For the characteristics of dower at common law, see Haskins, The Development of Common Law Dower, 62 Harv. L. Rev. 42 (1948).
10. Bush v. Bradley, 4 Day 298 (Conn. 1810); Kline v. Beebe, 6 Conn. 494 (1827); 4 Kent, Comm. *31; 1 Cruise, Real Property *140 n. (Greenleaf ed. 1856).
In the United States today curtesy in its common law form can hardly be said to exist. In a large number of states all vestiges of curtesy have been expressly abolished by statute. In other jurisdictions, as a result of the Married Women's Acts just referred to, which give a wife power to control and dispose of her property, it is generally recognized that the husband can have no present estate in his wife's lands during the marriage. The effect of that legislation is therefore to abolish by implication the principal features of the estate of curtesy initiate. However, in many states, although curtesy during the wife's life is abolished as a present estate, the husband has during marriage a protected expectancy, similar to inchoate dower, which cannot be defeated by her sole act. Where such an interest is recognized, it cannot be said that curtesy initiate has wholly disappeared.

Curtesy consummate is still recognized substantially as at common law in a small group of states. In such states the husband is entitled to a life estate in all lands of which his wife was seised during coverture of an estate of inheritance, provided issue has been born alive. In a second and larger group of states curtesy exists in modified form. These states permit the surviving husband to claim a life estate in lands of which the wife was seised during coverture, but they reduce his interest to dower proportion or other fractional share, and in gen-

12. For a summary of such jurisdictions, see 3 Vernier, American Family Laws 538 et seq. (1935).
14. Teckenbrock v. McLaughlin, 246 Mo. 711, 152 S.W. 38 (1912); Hackensack Trust Co. v. Tracy, 86 N. J. Eq. 301, 99 Atl. 846 (1917). See also statutes cited in notes 16 and 18 infra.
15. In Potter v. Steer, 95 N.J. Eq. 102, 122 Atl. 685 (1923), a judgment was granted against a husband's "inchoate right of curtesy" but execution withheld until his interest became consummate.
eral they have no requirement of birth of issue. In a few of these states his interest is termed "dower." In nearly all the states of these two groups the husband has a protected interest during coverture, which is similar to inchoate dower, and which he cannot be deprived of by her sole act. The present article is principally concerned with the husband's interest in the states of those two groups, and that interest will be referred to as "curtesy." In a third group of states, which purport to abolish curtesy, the husband is entitled to a specific interest in fee which attaches, with certain exceptions, to realty of which his wife was seised or possessed during coverture. Since these states recognize and protect in the husband an inchoate interest during marriage, many of the typical problems relating to curtesy arise in them, and they are accordingly considered to that extent within the scope of this article. A few jurisdictions, although describing the husband's interest as "curtesy," confine his interest to lands as to which she died intestate and permit the wife to defeat his interest by her sole conveyance. There seems little justification for including those jurisdictions in the groups which recognize some form of curtesy, and there will be only occasional references to them in this article.

In the remaining jurisdictions in the United States—nearly one-half of the states—curtesy has been completely abolished, either expressly or impliedly. In those states the husband is either a mere heir of his wife and shares only in case of intestacy, or he is a forced heir of his wife and may dissent from her will and take an absolute

21. Express provisions to this effect are found in the statutes of New Jersey, Oregon and West Virginia cited supra note 18.
23. In Missouri the Married Women's Act has been construed to permit the wife to defeat the husband's inchoate interest by her sole deed, despite the provision giving a widower the same share in his wife's lands as she has in his. Scott v. Scott, 324 Mo. 1055, 26 S.W.2d 598 (1930).
25. See references supra note 24.
27. What is said in IX infra with respect to the husband's interest after the wife's death is in large measure applicable in these jurisdictions. It may also be noted that the District of Columbia statute expressly requires birth of issue.
28. For a summary of these jurisdictions as of January 1, 1935, see 3 Vernier, American Family Laws 538-551 (1935).
share of the property owned by her at death. His rights in those jurisdictions are considered only incidentally here.

In a large number of American jurisdictions, including several of those which retain some form of common law curtesy, the husband is entitled upon his wife's death to a statutory share of her personal property which is free from her testamentary control. The husband's rights in his wife's personalty will not be considered.

II. REQUISITES OF CURTESY

In England at common law a husband was entitled to curtesy if the three following conditions were met: (1) lawful marriage to the woman in whose lands curtesy was claimed; (2) actual seisin in the wife of an estate of inheritance to which issue of the husband might by a possibility inherit; (3) birth of issue alive. He then had a present estate known as "curtesy initiate," which would become "consummate" if he survived her. In the United States, as a consequence of the Married Women's Acts, curtesy initiate as such no longer exists, and therefore a fourth condition, the death of the wife, must be met before the husband may claim curtesy or its statutory equivalent. Prior to his wife's death, the husband has at most a protected expectancy similar to inchoate dower.

Valid Marriage. The requirement of a valid marriage is a consequence of the fact that curtesy arises by operation of law as a result of the marriage relationship. If the marriage is void, curtesy does not arise; if the marriage is voidable, it persists subject to defeasance if annulled. The validity of the marriage is normally determined by the


31. See VIII infra.

32. For a summary of the husband's statutory rights in his wife's personalty, see 3 Verrier, American Family Laws 538-551 (1935).

33. Ibid.

34. Littleton, Tenures § 35.

35. For such jurisdictions, see note 14 supra. It should further be noted that at common law a husband was denied curtesy in the lands of an alien wife. Foss v. Crisp, 20 Pick. 121 (Mass. 1838); Burk v. Brawn, 2 Atk. 397 (1742). Cf. Sharp v. St. Sauveur, L.R. 7 Ch. 343 (1871) The disability of alienage has now been done away with in most states. Lumb v. Jenkins, 100 Mass. 527 (1868); Cooke v. Doron, 215 Pa. 393, 64 Atl. 595 (1906). See 1 Washburn, Real Property 65-68, 159 n. 2 (6th ed. 1902). In a few states today the husband is not entitled to curtesy if his wife is a nonresident. Iowa Code § 636.8 (1950); Neb. Rev. Stat. § 30-101 (1943). See Decker, Dower and Curtesy of Non-Resident Spouse, 1 Ore. L. Rev. 165 (1922).

36. Bruner v. Briggs, 39 Ohio St. 478 (1883); 1 Crispe, Real Property 154 (Greenleaf ed. 1856). If the marriage is not annulled in the wife's lifetime, the inchoate right becomes consummate, so that in that event a voidable marriage is sufficient to support curtesy. Stewart, Husband and Wife § 153 (1885).
law of the place where contracted, but if local policy is against a particular type of marriage, such a marriage, though valid by the law of the place where solemnized, may yet be invalid elsewhere. Today the problem of validity arises chiefly in connection with divorce, and it gives rise to difficult questions.

As a general proposition, it may be said that the law of the situs of land governs the husband’s right of curtesy. If a valid divorce is granted in the state where the parties are domiciled, it is usually held that the husband loses all rights to curtesy in lands located in that state or elsewhere, unless his right is preserved by statute. Hence, if the ex-wife remarries, her second husband will be entitled to curtesy wherever the second marriage is valid. If the divorce is granted in a jurisdiction other than where the land is situated, certain conflict of laws problems arise. Most courts seem to have held that a valid divorce cuts off the husband’s right of curtesy whether the divorce was secured within or without the state. A foreign divorce must be accorded full faith and credit, and it now seems that such a divorce may be challenged only on the ground that the court granting the decree had no jurisdiction. If both parties were present at the divorce proceedings and the question of jurisdiction was litigated, or if there was full opportunity to contest the jurisdictional issue, the question is res judicata and may not be subjected to a collateral attack. In effect, only ex parte divorces may be contested elsewhere. But it is still uncertain just what full faith and credit for a foreign decree means with respect to curtesy. It seems possible that a state may recognize a foreign divorce as ending the marital relationship and yet at the same time refuse to recognize it as necessarily affecting every other legal incident of that marriage.

40. Ibid. See Barrett v. Failing, 111 U.S. 523 (1884) (dower).
41. If the state of domicile which granted the divorce prohibits remarriage by the wife within a specified period of time, what will be the effect of her remarriage in another state within that period? Analogous cases relating to dower suggest that such marriage will usually be regarded as valid in the state of domicile for purposes of permitting the second husband to claim curtesy in lands located in the latter state. Loth v. Loth’s Estate, 54 Colo. 200, 129 Pac. 827 (1913); Putnam v. Putnam, 8 Pick. 433 (Mass. 1829). Contra, Wilson v. Cook, 256 Ill. 460, 100 N.E. 222 (1912); Lanham v. Lanham, 136 Wis. 360, 117 N.W. 787 (1908).
45. See Mr. Justice Jackson’s dissent in Estin v. Estin, 334 U.S. 541, 553 (1948).
46. Estin v. Estin, note 45 supra. For a recent discussion of this conception of divisible divorce, see Morris, Divisible Divorce, 64 Harv. L. Rev. 1287 (1951).
A number of states have statutes which specifically prescribe the effect of divorce on curtesy, but space does not permit detailed discussion of the varying approaches which states have followed in construing such statutes with respect to foreign divorces.\textsuperscript{47}

\textit{Seisin.} As to the requirement of seisin, it was well-established at common law that a husband was entitled to curtesy only in those lands of which his wife was solely and beneficially seised, at some time during coverture, of an estate of inheritance to which issue of the marriage might succeed.\textsuperscript{48} The requirement of seisin meant that the husband might have curtesy only in those estates which had vested in possession during the marriage, so that he was denied curtesy in remainders and reversions which had not so vested.\textsuperscript{49} As previously stated, actual seisin in deed was required, unless the acquisition of such seisin was legally impossible.\textsuperscript{50} The time of acquisition of seisin was unimportant, provided it was at some time during coverture.\textsuperscript{51} Curtesy attached to his wife's estates in fee simple, in fee tail general and (if he were the spouse named) in fee tail special.\textsuperscript{52} Although a widow was not permitted dower in equitable estates,\textsuperscript{53} a contrary rule was recognized with respect to curtesy, so that the husband was entitled to curtesy out of his wife's equitable estates under circumstances similar to those which gave rise to curtesy at law.\textsuperscript{54}

In the United States, the foregoing rules with respect to seisin have been generally accepted in those jurisdictions where some form of curtesy continues to be recognized,\textsuperscript{55} except that the requirement of actual seisin has been largely dispensed with. Only a few modern cases have required an entry by the wife in order to entitle the husband to curtesy.\textsuperscript{56}

\textsuperscript{47} See 3 \textsc{Vernier}, \textit{American Family Laws} 568-570 (1935).
\textsuperscript{48} Co. \textsc{Litt.} *30a.
\textsuperscript{49} Co. \textsc{Litt.} *29a.
\textsuperscript{50} Eager v. Furnivall, 17 Ch. D. 115 (1881). Physical impossibility was not considered an excuse. \textsc{Perkins}, \textit{Profitable Book} § 470 (1586). The origin of this curious rule seems to lie in a sentiment favoring family stability. The husband had curtesy only in what the child, had he lived long enough, could have seen his father enjoying; of that the child was not permitted to deprive his father. See Farrer, \textit{Tenant by the Curtesy of England}, 43 L.Q.R. 87 (1927).
\textsuperscript{51} 2 Bl. \textsc{Comm.} *128.
\textsuperscript{52} Littleton, \textit{Tenures} § 35. If he were a second husband, he would have no curtesy in lands given to his wife and the heirs of her body by her first husband. Statute of Westminster II, 1285, 13 Edw. I, c. 1.
\textsuperscript{53} \textsc{Challis}, \textit{Real Property} 346 (3rd ed. 1911); \textsc{Maitland}, \textit{Equity} 114 (1909). Lord Mansfield pointed out in the mid-eighteenth century that the refusal of dower in equitable estates was not based upon reason but had come about because the prior "wrong determination had misled in too many instances to be now altered and set right." Burgess v. Wheate, 1 W.Bl. 123, 160 (1759).
\textsuperscript{54} Watts v. Ball, 1 P. Wms. 108 (1708) (trust); Casborne v. Scarfe, 1 Atk. 603 (1737) (equity of redemption).
\textsuperscript{55} See 1 \textsc{Cruise}, \textit{Real Property} 154-155 (Greenleaf ed. 1856).
and it is now widely held that seizin in law is sufficient.57 Thus, it may be said that in most jurisdictions recognizing some form of curtesy the wife is sufficiently seizin if she has actual possession of a freehold estate or if she is entitled to possession of such an estate by descent, devise, or deed. Actual entry is required, however, if, at the time she becomes entitled, the land is in the adverse possession of another.59 On the ground that there can be no seizin of future estates of freehold, curtesy is denied in remainders, reversions and other future interests which have not vested in the wife's lifetime.60 However, since the owner of such an interest following a term for years is regarded as having seizin,61 curtesy attaches to reversions and remainders which are subject to a term.62 Since the owner of a term is not seized, the husband has no curtesy in his wife's leasehold interests,63 but that rule has been modified by statute in an occasional jurisdiction.64 As in the corresponding case of dower, it is required that the wife's seizin be sole, so that curtesy does not attach to lands held by the wife in joint tenancy with another or others.65 Following the English rule, curtesy attaches to the wife's equitable estates of inheritance, including sole and separate use trusts,67 so that today ownership of an equitable interest is the court confined the rule to cases in which the wife takes by inheritance and stated that it had no application to cases in which she took by deed or by will.

57. Mettler v. Miller, 129 Ill. 630, 22 N.E. 529 (1889); Tyndall v. Tyndall, 186 N.C. 272, 119 S.E. 354 (1923). Cf. VA. Code Ann. § 5139a (1942) ("seized in fact or in law").

58. The wife's adverse possession for a period shorter than that required by the statute of limitations is sufficient seizin for curtesy to attach. Rochon v. Lecatt, 129 Ill. 630, 22 N.E. 529 (1889); Tyndall v. Tyndall, 186 N.C. 272, 119 S.E. 354 (1923). Cf. VA. Code Ann. § 5139a (1942) ("seized in fact or in law").


62. Carter v. Williams, 43 N.C. 177 (1851); Lowry's Lessee v. Steele, 4 Ohio 170 (1829); 1 Washburn, Real Property 151 (6th ed. 1902).

63. 4 Kent, Comm. *30 and cases there cited.


67. Cushing v. Blake, 30 N.J. Eq. 689 (1879); Travis v. Sitz, 135 Tenn. 156, 185 S.W. 1075 (1916). If the instrument creating the trust expressly excludes curtesy, equity will give effect to the terms of the trust. Wood v. Reamer, 118 Ky.
usually the equivalent of seisin at law for purposes of curtesy. As in the analogous case of dower, American courts require that the wife's seisin be beneficial; therefore, when legal title is in the wife as trustee or mortgagee, or if she is a mere conduit of title, her husband will not be entitled to curtesy. If the other requisites of curtesy are complied with, the time at which the wife becomes seised is immaterial, provided it be during coverture. Thus, the husband has been held entitled to curtesy in lands of which the wife was seised before the birth of issue provided the required issue was subsequently born.

**Birth of Issue.** The third requisite for curtesy at common law was the birth of issue of the marriage. Birth of issue was not required in order to entitle a woman to dower. The reasons for its being required in the case of curtesy seem to have been connected with ideas of guardianship which the writer has discussed elsewhere. The persistence of the requirement into the modern period can be explained only in terms of the rigor with which the common law judges continued to apply many old rules which had lost their original *raison d'être*. It was required that the child be legitimate, and that it be born alive in the life of its mother, but the immediate death of the child did not affect the husband's right to curtesy established by its birth.


68. It has been held in Nebraska that a wife's interest as vendee under a contract of sale is insufficient to entitle her husband to curtesy when the entire payment has not been made and her equity is therefore "incomplete." Grandjean v. Beyl, 78 Neb. 349, 110 N.W. 1108 (1907).

69. See 1 Scribner, Dower 278-279 (2d ed. 1883).

70. 4 Kent, COMM. *32; 1 Weshuren, Real Property 154 (6th ed. 1902).


72. E.g., in the case of a purchase-money mortgage. See note 190 infra.

73. Comer v. Chamberlain, 6 Allen 166 (Mass. 1863). See 2 Bl. COMM. *128. If the wife acquires seisin after the death of the child, the husband will be entitled to curtesy. Donovan & Boyd v. Griffith, 215 Mo. 149, 114 S.W. 621 (1908). Early authorities are collected in Note, 20 L.R.A. (N.S.) 825 (1909).


75. Although by canon law a child might be legitimated by a subsequent marriage, such a child was not regarded by the temporal courts as legitimated for purposes of succession to English land. Maitland, Roman Canon Law in the Church of England 53-56 (1898).

76. 2 Bl. COMM. *127. Birth by caesarian operation after the wife's death was held insufficient to give curtesy to the husband. Ibid.; Co. Litt. *29b.

77. Littleton, Tenures § 35; Co. Litt. *30a. The husband would also be entitled to curtesy in lands which the wife acquired after the child's death and during the subsistence of the marriage. 2 Bl., COMM. *128.
condition that the child be born alive was ordinarily satisfied by testimony that it had been heard to cry. In the United States, the requisite of birth of issue has been generally abandoned, but it still survives in two or three states. Where birth of issue has been recognized as a condition precedent to curtesy, the common law requirements have generally been insisted upon. Although as at common law the adoption of a child will not give rise to curtesy, the legitimation after marriage of a child born to the parties theretofore has been held sufficient to entitle the husband to curtesy.  

As previously stated, the death of the wife is now universally required in this country in order for the husband to be entitled to an estate of curtesy. Prior to her death, however, he usually has a protected interest which arises when the other conditions required for curtesy have been complied with.  

III. Property and Interest Subject to Curtesy

Curtesy, like dower, attaches to lands and tenements of which the wife has the requisite seisin during coverture and to which issue of the marriage may by a possibility succeed. Thus, a husband may

78. Y.B. 20-21 Edw. I (Rolls Ser. 1866) 39 (1292); LITTLETON, TENURES, § 35.  
83. Sadler v. Campbell, 150 Ark. 594, 236 S.W. 588 (1921); Duncan v. Duncan, 167 Mo. 167, 23 S.W.2d 91 (1929); Hackensack Trust Co. v. Tracy, 86 N.J. Eq. 301, 99 Atl. 846 (1917).  
84. In Matter of Lindewall, 287 N.Y. 347, 39 N.E.2d 907 (1942), it was held that the husband's civil death, resulting from sentence to life imprisonment, terminates all property interests in the estate of his later dying spouse. For the effect of civil death generally, see Note, 139 A.L.R. 1308 (1942).  
85. LITTLETON, TENURES § 52; 2 BL., COMM. *126. The word "tenements" used in connection with curtesy seems to have included rights issuing out of or annexed to corporeal inheritances capable of actual seisin. Thus, at common law a husband might have curtesy in a rent-charge, an advowson in gross, a fair, a bailiwick, and the like. PERKINS, PROFITABLE BOOK §§ 499 et seq. (1586). In Maine a husband is not entitled to a share in the wild lands of which the wife was seised during coverture, even if they were cleared in her lifetime; but curtesy does attach to wild lands of which the wife dies seised. ME. REV. STAT. c. 156, § 1 (1944).  
86. See generally, II supra.  
87. LITTLETON, TENURES § 52.
have curtesy in his wife's estates in fee simple, in fee tail general and (if he is the spouse named) in fee tail special. Curtesy is not permitted in estates held by his wife for her life. Although an estate pur autre vie will not necessarily terminate at the wife's death, curtesy is also denied in all such life estates. The requirement of seisin limits curtesy to freehold interests, and curtesy is consequently excluded from leasehold estates of which the owner cannot be seised.

As previously stated, curtesy attaches to the wife's equitable estates under circumstances similar to those which give rise to curtesy at law. Curtesy also attaches to an equity of redemption owned by the wife during coverture, and to an equitable interest under a contract of sale. The interest may also attach to the surplus produced by the foreclosure of a mortgage superior to curtesy, to the proceeds of a sale which retain the character of realty, and to money which is directed to be laid out in land.

The husband's rights in his wife's mortgaged property generally follow the principles outlined by the writer elsewhere in connection with dower, and most of that discussion is accordingly applicable to curtesy. Thus, if a wife executes a mortgage during coverture, or if, before or during marriage, she acquires property already encumbered by a mortgage, her husband's inchoate right will attach to such property as against all but the mortgagee and those claiming under him. If the wife executes a mortgage upon her land during coverture, her husband's

88. Chilton v. Chilton, 217 Ky. 258, 289 S.W. 275 (1926); LITTLETON, TENURES §35; 1 CRUISE, REAL PROPERTY 161-162 (Greenleaf ed. 1856).

If lands are exchanged by the wife, the widower must usually elect the tract in which he wishes to claim curtesy. ILL. ANN. STAT. c. 41, §17 (1935); ORE. COMP. LAWS ANN. §§17-102, 104 (1940).

89. Gray v. Clement, 296 Mo. 497, 246 S.W. 940 (1922); Waller v. Martin, 106 Tenn. 341, 61 S.W. 73 (1901).

90. Folwell v. Folwell, 65 N.J. Eq. 526, 56 Atl. 117 (1903).

91. See Note, 11 L.R.A. 825, 826 (1891); 4 KENT, COMM. *30, and cases there cited. A contrary rule is occasionally recognized by statute. E.g., MASS. GEN. LAWS c. 186, §1 (1932); MO. REV. STAT. ANN. §§318, 319 (1939).

92. See II supra.


95. See authorities cited in notes 101, 104 and 105 infra.


99. E.g., ILL. ANN. STAT. c. 41, §3 (1935); ORE. COMP. LAWS ANN. §§17-103, 104 (1940).
rights are usually superior to the claim of the mortgagee, unless he releases his inchoate right by joining in the mortgage.100 In the latter event, the husband is entitled to curtesy, but his claim is subject to the right of the mortgagee and those claiming under him.101 If during coverture a wife buys realty and gives back to the vendor a purchase-money mortgage by way of security, the mortgage lien is superior to curtesy, whether or not the husband joins in the giving of the mortgage.102 If property is sold after the wife’s death to satisfy an encumbrance superior to curtesy, the widower is usually entitled to curtesy in the surplus proceeds.103 Although there is some authority to the effect that, if foreclosure takes place in the wife’s lifetime, the husband’s right in the wife’s equity of redemption will be protected by transferring his interest to a fund of the surplus established for his benefit,104 it is more generally held that under those circumstances the surplus is personal property which belongs to the wife free of the husband’s inchoate curtesy.105

Curtesy, like dower, may be claimed in mines and quarries106 and in oil wells,107 but, as in the case of dower, curtesy will be denied in mines or in wells which were not opened in the wife’s lifetime.108 Cases in which curtesy has been claimed in partnership property have seldom arisen,109 but it is clear that in jurisdictions which have adopted the Uniform Partnership Act110 land acquired with partnership funds is not subject to curtesy.111

In most jurisdictions where curtesy in some form is recognized, the husband’s interest attaches to lands which he conveys to his wife,

100. See note 190 infra.
107. Cases are collected in Note, 36 L.R.A. (N.S.) 1099, 1108 (1912).
110. Analogous decisions relating to dower are presumably applicable. See Note, 25 A.L.R. 389 (1923).
111. Uniform Partnership Act § 25(e).
either directly or through a third person, unless the language of the deed indicates an intention to divest him of any interest therein.

IV. Defeasibility of Wife's Interest

Provided that the requisites for curtesy have been satisfied, the husband's interest attaches to the wife's property notwithstanding the fact that her estate is subject to conditions and restrictions. Like dower, curtesy has usually been regarded as a derivative interest which depends upon the estate of the wife and cannot rise higher than its source. Hence, in most situations, the husband's inchoate right and his estate after her death are subject to the same defects and limitations existing in the wife's estate at the time his interest attached. Thus, if the wife's title is defective, the husband's interest is defeasible to one having the interest which constitutes the defect. Similarly, curtesy may be defeated or impaired by the assertion of an outstanding vendor's lien which attached to the land before or during marriage. If the wife's estate is subject to a special limitation or to a right of entry for condition broken, the husband's estate is terminable upon the same terms as her own estate.

As in the corresponding case of dower, there are certain situations in which the courts have not adhered to the conception of curtesy as a derivative interest. Although the soundness of their holdings seems open to question, the decided cases are all but unanimous in stating that curtesy is unaffected by the expiration of the wife's estate or by the termination thereof by an executory limitation. Those holdings have been roundly criticized by the Restatement of Property on the ground that in every other situation curtesy is regarded as a provision for the

112. Cases are collected and discussed in Note, 30 A.L.R. 1057 (1924).
115. 1 Restatement, Property App. 2 (1936); 1 Washburn, Real Property 147-148 (6th ed. 1902).
116. 1 Restatement, Property App. 2 (1936).
118. 4 Kent, Comm. *33; 1 Restatement, Property App. 4 n.8 (1936); 1 Washburn, Real Property 147-148 (6th ed. 1902).
120. Cooper's Adm'r v. Clarke, 192 Ky. 404, 233 S.W. 881 (1921); Buckworth v. Thirkell (1785), reported in note to Doe v. Hutton, 3 Bos. & P. 643, 652 et seq. (C.P. 1804), 1 Collectanea Juridica 332 (Hargrave ed. 1791); Hatfield v. Sneden, 54 N.Y. 280 (1873). The foregoing cases involve executory interests, but the principle has been applied in the case of the exercise of a power appendant. See Archer v. Urquhart, 23 Ont. 214 (1893).
121. 1 Restatement, Property App. 3 (1936).
widower out of the assets of the deceased spouse and that he is entitled to a share of what his wife had, no more and no less. 122

V. Extent of the Interest

At common law, the husband's curtesy was a life estate in all his wife's estates in fee simple and fee tail of which she had the requisite seisin 123 and to which issue of the marriage might by a possibility succeed. A few American jurisdictions permit the husband to claim an interest of similar extent, 124 but more commonly his life estate is reduced to dower proportion 125 or other fractional share. 123 Several states which purport to abolish curtesy, but which are nevertheless considered within the scope of this article, 127 give the husband a specified interest in fee which attaches, with certain exceptions, to realty of which his wife was seised or possessed during coverture. 128 In most jurisdictions in which the husband has an inchoate interest during marriage, that interest cannot be defeated by the wife's creditors during coverture or after her death. 129

In jurisdictions which have effectually abolished all vestiges of curtesy, the husband is generally entitled to take as forced heir a statutory substitute frequently patterned on the local intestacy statute. Those statutes are not considered within the scope of this article, and in any event they are too varied and too complex to render classification of much value. 130 His interest under such statutes is usually subject to the claims of his wife's creditors.

VI. The Interest Before Wife's Death

At common law curtesy initiate was a present estate, 131 measured by the husband's own life and extending to all lands of which his wife

123. See II supra.
127. See note 24 supra.
130. For a convenient summary of such statutes, see 3 Vernier, American Family Laws 539-552 (1935).
131. See text at note 2 supra.
had or might acquire the requisite seisin during coverture. He was entitled to the use and occupation of the property to which his interest attached, together with all the rents and profits of the same.\textsuperscript{132} He might convey it or encumber it,\textsuperscript{133} and it was subject to execution for his debts.\textsuperscript{134} His interest during coverture was basically different from the wife's corresponding right of inchoate dower, which was merely a protected expectancy and not a present estate.

As already stated, in the United States the Married Women's Acts of the nineteenth century had the effect of abolishing by implication curtesy initiate as a present estate.\textsuperscript{135} In several jurisdictions, however, those acts were interpreted to mean that the husband had during coverture a protected expectancy similar to inchoate dower;\textsuperscript{136} in other jurisdictions, statutes expressly created such an expectancy by their specifications of the interest to which he was entitled upon his wife's death.\textsuperscript{137} Where the husband has before his wife's death a protected expectancy which is similar to inchoate dower,\textsuperscript{138} that expectancy arises upon the concurrence of marriage, seisin and (where required) birth of issue.\textsuperscript{139} The interest is not an estate in land, and the husband cannot convey, assign or mortgage it.\textsuperscript{140} Yet it is a property right having a present value, and, with few exceptions considered hereafter,\textsuperscript{141} the husband cannot be deprived of it while the marriage endures, unless he consents thereto or predeceases his wife.\textsuperscript{142} Although he cannot...


\textsuperscript{135} See I supra.

\textsuperscript{136} Teckenbrock v. McLaughlin, 246 Mo. 711, 152 S.W. 38 (1912); Hackensack Trust Co. v. Tracy, 86 N.J. Eq. 301, 99 Atl. 846 (1917).

\textsuperscript{137} See notes 18 and 24, supra.

\textsuperscript{138} See notes 16, 18 and 24, supra.

\textsuperscript{139} The requisites for curtesy are discussed in I supra.

\textsuperscript{140} Cases are collected in Note, 56 L.R.A. (N.S.) 997, 1007 (1915). However, the husband may release his right in the manner prescribed by the applicable statute. See VII infra. In North Carolina, where the husband's "curtesy" is confined to lands as to which his wife dies intestate, it has been held that the husband may convey in the wife's lifetime what the court termed his "valuable interest." Colwell v. O'Brien, 198 N.C. 228, 151 S.E. 190 (1930), 8 N.C.L. Rev. 476 (1930).

\textsuperscript{141} See text infra at notes 153 et seq.

\textsuperscript{142} See cases cited in notes 144, 145 and 148 infra. The husband's interest is not subject to attachment or sale under execution during the wife's lifetime. Ball v. Woolfolk, 175 Mo. 278, 75 S.W. 410 (1903); Hitz v. Nat. Metropolitan Bank, 111 U.S. 722 (1884).
ordinarily have the interest set apart to him in his wife’s lifetime, ordinary he may be entitled under appropriate circumstances to injunctive or other relief to prevent its destruction by the wife, her transferees or creditors.

The rule that the husband is entitled to have his inchoate interest protected may be illustrated by a few examples. If during coverture the wife conveys land without the husband’s joinder or release, his inchoate right is in no way affected. A mortgage or lien acquired on the property during coverture without his joinder does not affect his right, unless the encumbrance is a purchase-money mortgage or a vendor’s lien. Similarly, in the absence of statute, his right cannot be defeated by the wife’s judgment creditors who levy execution upon her property for a debt incurred after marriage, or by an adverse possession for the statutory period in her lifetime. Even in the case of a mortgage or other lien which is superior to curtesy, the husband frequently has a right to redeem from such a mortgage or encumbrance; and, if the mortgage is foreclosed during coverture, he may in some states be given an interest in the surplus proceeds.

His right will also be protected from fraudulent schemes to destroy it: for example, if, on the eve of marriage, a woman transfers land, without the knowledge and consent of her husband-to-be and for the purpose of

143. In an occasional state, if the husband secures a divorce for the fault of the wife, his interest is accelerated and he is entitled to have it assigned in the wife’s lifetime. Ore. Comp. Laws Ann. (1940), § 9-912. Cf. Mass. Gen. Laws (1932), c. 208, § 27 (Dower).


An occasional state has made provision for barring the husband’s interest with compensation when the wife is under a contract to sell and he refuses to release his interest. Me. Rev. Stat. c. 156, § 19 (1944); W. Va. Code Ann. § 4101 (1949).

145. Wright v. Pell, 90 N.J. Eq. 11, 105 Atl. 20 (1918). See statutes referred to in note 144 supra.


148. See text infra at notes 201 et seq.

149. Jones v. Coffey, 109 N.C. 515, 14 S.E. 84 (1891). This rule is a consequence of the fact that the statute of limitations does not begin to run in favor of an adverse possessor until there is a right of action against him. See 1 Restatement, Property § 222 (1936). In Calvert v. Murphy, 73 W. Va. 731, 81 S.E. 403 (1914), the statute of limitations ran against the wife during coverture, but it was held that the husband was denied curtesy since she did not die seised of the property as then required by W. Va. Code § 3663 (1913), since repealed. The husband’s share now attaches to land of which the wife was seised at any time during coverture. W. Va. Code Ann. § 4096 (1949).

150. See 2 Jones, Mortgages § 1366 (1928).

defeating his curtesy, the conveyance will be set aside to the extent
necessary to preserve his right.\footnote{152}

Several states have statutes which deny protection to the inchoate
right in special situations, such as in execution sales,\footnote{153} or when the
husband is a nonresident.\footnote{154} Illinois provides that a mechanic's lien is
superior to the husband's right if he has knowledge of the improvements
and does not give written notice of his objection before they are made.\footnote{155}
Generally, as in the case of dower, the purchaser at a partition sale takes
the land free of the claim of curtesy,\footnote{156} and the same is presumably true
of the state when it takes land by eminent domain.\footnote{157} In Maine and
West Virginia, if the wife is under contract to sell land and the husband
refuses to release his interest, that interest may be barred with compen-
sation by the court having jurisdiction of such matters.\footnote{158} In some
states, the purchaser at a tax sale may take free of curtesy.\footnote{159}

Except in the foregoing special situations, or when the interest
has been barred in some recognized manner,\footnote{160} the husband's inchoate
right is an encumbrance upon the wife's lands, and she cannot without
his joinder convey a clear title.\footnote{161} The existence of that right is con-
sequently a source of substantial difficulty to the title examiner; it com-
plicates suits for specific performance by the wife's vendee; it is dis-
advantageous to judgment creditors; and it is a clog on the mar-
ketability of land.\footnote{162} Since the husband is generally self-supporting, the
arguments for protecting his inchoate interest are less persuasive than
those for protecting the analogous interest of the wife, and this is par-
ticularly true when its protection results in defeating the claims of
honest creditors and in fettering the alienability of land.

\footnote{152. TENV. CODE ANN. \S 8366 (Williams, 1934); Tucker v. Andrews, 13 Me. 124
(1836); Logan v. Simmons, 38 N.C. 487 (1845); WASHBURN, REAL PROPERTY
155 (6th ed. 1902) and cases there cited.}

\footnote{153. IOWA CODE \S 636.5 (1950); KAN. GEN. STAT. ANN. \S 22-108 (1935); MINN.
STAT. \S 523.16(2) (Henderson 1949); NEB. REV. STAT. \S 30-101 (1943).}

\footnote{154. IOWA CODE \S 636.8 (1950); NEB. REV. STAT. \S 30-101 (1943). See Decker,
Dower and Curtesy of Non-Resident Spouse, 1 ORLE. L. REV. 165 (1922).}

\footnote{155. ILL. ANN. STAT. c. 82, \S 1 (1935).}

\footnote{156. See 3 VERNIER, AMERICAN FAMILY LAWS 565-566 (1935). Apparently, in
most states he will have a protected interest in the proceeds. E.g., DEL. REV. CODE
\S 3750 (1935); IOWA CODE \S 636.3 (1950); ORE. COM. LAWS ANN. \S 9-626 (1940);
W. VA. CODE ANN. \S 4100 (1949). See 26 COL. L. REV. 1037-1038 (1926).}

\footnote{157. See analogous cases relating to dower in Note, 5 A.L.R. 1347 (1920); 80
U. OF PA. L. REV. 749 (1932).}

\footnote{158. ME. REV. STAT. c. 156, \S 19 (1944); W. VA. CODE ANN. \S 4101 (1949).}

\footnote{159. N.J. REV. STAT. \S 54:6-1 (1937). See Note, 75 A.L.R. 416, 430 (1931).}

\footnote{160. See generally VII infra.}

\footnote{161. See text infra at notes 180 \textit{et seq.}}

\footnote{162. Kennedy v. Koopman, 166 Mo. 87, 65 S.W. 1020 (1901).}
VII. BARRING CURTESY

When the husband’s inchoate interest—whether curtesy or a statutory substitute therefor—has attached to the wife’s land, it cannot be defeated except for certain defined and limited causes and in certain definite ways. As already explained, his interest is subject in most situations to the same defects and limitations existing in the wife’s estate at the time his interest attached, but except in those situations it cannot generally be defeated without his consent. In many states, however, there are statutory provisions which may be invoked to bar curtesy in special situations. Thus, in some states the wife may convey her land free of curtesy if the husband is a nonresident of the state where the land is situated. In two states provision is made for the compulsory extinguishment of curtesy in the case of a sale of land in which the husband has refused to join in the deed, or in the case of a suit for specific performance brought by a vendee under a contract of sale made by the wife. Other situations are treated in detail below.

Curtesy or its statutory equivalent is of course barred when expressly abolished by legislative provision. Usually in states where curtesy or similar statutory share has been abolished there is substituted a scheme of statutory heirship which has none of the characteristics of curtesy as herein discussed. Generally, in such jurisdictions, a wife may defeat her husband’s forced share to the extent that she conveys away her property in her lifetime and relinquishes all control thereof, but that share is nevertheless protected against her testamentary dispositions.

163. See IV supra.

164. In Missouri, the Married Women’s Act has been construed to permit the wife to defeat her husband’s inchoate interest by her sole deed. Scott v. Scott, 324 Mo. 1055, 26 S.W.2d 598 (1930). In some cases curtesy will be barred on a theory of estoppel if the husband’s acts or conduct are inconsistent with his claim. Heisen v. Heisen, 145 Ill. 658, 34 N.E. 597 (1893); Dooley v. Merrill, 216 Mass. 500, 104 N.E. 345 (1914).

165. IOWA CODE § 636.8 (1950); NEB. REV. STAT. § 30-101 (1943).


168. Reference should also be made to the fact that curtesy may be barred by partition or condemnation proceedings, notes 156 and 157 supra, or by tax sale, note 159 supra.

169. Difficult constitutional questions can arise if the statute abolishing curtesy is in any degree retroactive. If the parties are married and the land is acquired after the effective date of the statute, the statute is valid. But if the time of marriage and of the acquisition of the land precede the effective date, it becomes necessary to determine whether the husband’s interest is so “vested” as to be indestructible. Compare Duncan v. Duncan, 324 Mo. 167, 23 S.W.2d 91 (1929), and Scaife v. McKee, 298 Pa. 33, 148 Atl. 37 (1929), with Schmidt v. Gardner, 120 N.J. Eq. 235, 184 Atl. 624 (1936).

170. Statutory provisions are summarized in 3 VERNIER, AMERICAN FAMILY LAWS 416-422 (1935).
side with curtesy. In such states the husband is put to an election between the two at her death, and his choice of the statutory share will effectively bar his curtesy.\textsuperscript{171}

By Contract or Settlement. Statutes offering a means of barring curtesy by antenuptial settlement are available in several states.\textsuperscript{172} Under such statutes curtesy is barred by a settlement on an intended husband, if made with his consent, or by any pecuniary provision made for his benefit in lieu of curtesy and with his assent. As Vernier states,\textsuperscript{173} those statutes are fragmentary and antiquated in character and are probably seldom utilized today. More commonly used are antenuptial agreements whereby parties intending marriage contract with respect to the share that each is to have in the property of the other. Such a contract, if fair and entered into without imposition, will effectively bar the husband's right of curtesy.\textsuperscript{174} Similarly, in most states, the husband may bar his interest by contracting with his wife during marriage. At common law such contracts were invalid because of the incapacity of married persons to contract \textit{inter se}. Although today there is little express legislative authorization for such contracts,\textsuperscript{175} they are nevertheless effective to bar curtesy in most states,\textsuperscript{176} if entered into without imposition and supported by adequate consideration.\textsuperscript{177} A common example of such contracts are those found in separation agreements. If the agreement is valid, it is effective to bar the husband's curtesy if it contains an express statement to that effect.\textsuperscript{178}

In several states it is provided that, if the husband is lawfully evicted from lands settled on him by jointure or other provision, he is entitled to a share in his wife's property as if such jointure or provision had not been made.\textsuperscript{179} The effect of such legislation is therefore to

\textsuperscript{171} VIII infra.
\textsuperscript{173} 3 Vernier, American Family Laws 561 (1935).
\textsuperscript{174} King v. King, 184 Mo. 99, 82 S.W. 101 (1904); Gilmore v. Burch, 7 Ore. 374 (1879). See McGee v. McGee, 91 Ill. 548 (1879) (wife's dower).
\textsuperscript{175} See 3 Vernier, American Family Laws 561 (1935).
\textsuperscript{176} Cases are collected in Note, 49 A.L.R. 116 (1927). In some states such contracts are expressly forbidden. Iowa Code § 597.2 (1950); Minn. Stat. § 519.06 (Henderson, 1949); Ore. Comp. Laws Ann. § 63-205 (1940). In a few other states, contracts between husband and wife are not permitted. 3 Vernier, American Family Laws 65-71 (1935).
\textsuperscript{177} Crum v. Sawyer, 132 Ill. 443, 24 N.E. 956 (1890); In re Lauderback's Estate, 106 Neb. 461, 184 N.W. 128 (1921).
\textsuperscript{178} Luttrell v. Boggs, 168 Ill. 361, 48 N.E. 171 (1897); McBreen v. McBreen, 154 Mo. 323, 55 S.W. 463 (1900).
revive the husband’s right of curtesy at the time of eviction from land settled on him.

By Deed or Release. At common law, marriage incapacitated the wife to convey her lands without her husband’s joinder, but that incapacity has been largely removed in the United States as a result of the so-called Married Women’s Acts and similar legislation permitting a married woman to convey or dispose of her property as if sole. However, the scope of such statutes removing the wife’s incapacity is limited by the existence of a contingent right by way of curtesy existing in the husband during marriage. In nearly all states recognizing such a contingent right, the wife cannot, by her sole deed, defeat that interest once it has attached. If the husband releases his interest in the manner permitted by the applicable statute, his right to curtesy is extinguished. The specific requirements for the execution of a valid release vary widely from state to state, and it is not profitable to detail them. Suffice it to say that in all American jurisdictions recognizing inchoate curtesy or a similarly protected interest during coverture a husband can bar that interest by joinder with his wife in her deed or mortgage.

In certain situations the wife may convey full title without the joinder of her husband, notably in cases where the inchoate right has been barred at the time the deed is executed. The same is true by statute in other situations, as when he has abandoned her, or when he has been declared judicially dead after an absence of seven years. In several states by statute the husband’s inchoate right is barred without his joinder in lands sold on execution or under a “judicial” sale. Nearly everywhere a mortgage given by the wife to secure the purchase price of land will bar the husband’s curtesy without his joinder.

181. See VI supra.
182. Cases are collected in Note, 14 A.L.R. 355, 358 (1921).
184. These statutory provisions are classified in 3 Vernier, American Family Laws 563 (1935).
185. Problems arising in connection with the release of the inchoate interest are discussed in 3 Vernier, American Family Laws 562-563, 566 (1935).
186. For example, if the husband has joined in the wife’s contract to convey.
By Will. In states where the husband has a protected expectancy in the wife's lands during the marriage she cannot usually defeat that expectancy by her will,\textsuperscript{191} despite the Married Women's Acts empowering her to dispose of her property as if sole.\textsuperscript{192} In a few states she may bar the husband's curtesy by will if the local statute confines his interest to lands of which she is seised at death.\textsuperscript{193}

As in the corresponding case of dower, if the wife makes a testamentary provision in favor of the husband which is intended to be in lieu of curtesy, he is put to an election between that and the interest to which he is entitled by way of curtesy.\textsuperscript{194} His election to take the testamentary provision will then effectively bar his curtesy.\textsuperscript{195} In most jurisdictions a testamentary provision is presumed to be in lieu of curtesy unless a contrary intention appears in the instrument.\textsuperscript{196} Only when it clearly appears on the face of the will that the testamentary provision was intended to be in addition to curtesy will he be permitted to claim both.\textsuperscript{197} Usually, when the husband is required to elect and he fails to do so, the law will make the election for him,\textsuperscript{198} so that in most jurisdictions he must take affirmative action if he wishes to take his curtesy interest. The time and manner of election is generally closely specified by statute,\textsuperscript{199} and close compliance therewith is essential.\textsuperscript{200}

By Appropriation for Wife's Debts. At common law, because of the general disability of a married woman to contract obligations dur-
ing coverture, the problem of whether or not her debts took precedence over the husband's right of curtesy was not likely to arise. Today, however, the problem has considerable significance because of the wife's power to incur debts. Few states deal with the matter by statute, and where the question has arisen in the absence thereof it has usually been held, by analogy to dower, that the husband's curtesy cannot be defeated by his wife's creditors either during coverture or after her death. However, a mortgage or similar lien which attached to the wife's land before marriage or which was given during coverture to secure the purchase price of land is superior to curtesy and may be enforced against the land to the extent necessary to satisfy the debt.

Legislation in several states has altered the foregoing in certain special situations. In Maine, for example, an assignee for the benefit of creditors, or one holding title by levy of sale or execution, may bring an action to have the husband's interest divested with compensation. In Iowa, Kansas, Minnesota and Nebraska the husband is not entitled to a statutory share in lands sold on execution or judicial sale. An Illinois statute provides that a mechanic's lien is superior to the husband's interest if he knew of the improvements and did not give written notice of his objection thereto before they were made. If the husband's interest in his wife's realty is confined to the interest of which she died seised or owning, that interest is nearly always subordinate to the claims of his wife's creditors.

By Misconduct. In the absence of statute, misconduct on the part of the husband does not deprive him of curtesy, unless his misconduct results in a divorce which terminates the marriage relationship. By

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201. See statutes cited in notes 204-206 infra.
202. Myers v. Hansborough, 202 Mo. 495, 100 S.W. 1137 (1907); Browne v. Bockover, 84 Va. 424, 4 S.E. 745 (1888); Gilkison v. Gore, 79 W. Va. 549, 91 S.E. 395 (1917). In Indiana, the husband's interest has been held to be subject only to the wife's antenuptial debts. Kemph v. Bellnap, 15 Ind. App. 77, 43 N.E. 891 (1895). As to whether or not curtesy is an asset in bankruptcy, see Note, 48 A.L.R. 784, 793 (1927); Salcer, Dower and Curtesy Rights in Bankruptcy, 53 Com. L.J. 65 (1948).
203. E.g., ILL. ANN. STAT. c. 41, §§ 3, 4 (1935); ORE. COMP. LAWS ANN. §§ 17-103,-104,-401 (1940).
204. ME. REV. STAT. c. 156, § 19 (1944).
205. IOWA CODE § 635.5 (1950); KAN. GEN. STAT. ANN. § 22.108 (1935); MINN. STAT. § 525.16(2) (Henderson, 1949); NEB. REV. STAT. § 50-105 (1943).
206. ILL. ANN. STAT. c. 82, § 1 (1935).
207. E.g., D.C. CODE § 18-215 (1940); N.C. GEN. STAT. ANN. § 52-16 (1943); WIS. STAT. § 233.23 (1947).
208. Stewart v. Ross, 50 Miss. 776 (1874); Miller v. Hanna, 89 Neb. 224, 131 N.W. 226 (1911).
210. The effect of divorce is considered infra.
statute, however, various forms of misconduct, such as, adultery,\(^{211}\) desertion or abandonment of the wife,\(^{212}\) neglect or refusal to provide for her,\(^{213}\) will bar the husband of curtesy. Although only an occasional statute bars the husband of curtesy for the felonious killing of his wife,\(^{214}\) most states have statutes which deprive a murderer of all rights in his victim's property and which in most cases are sufficiently broad to exclude the husband from curtesy under those circumstances.\(^{215}\)

Legislation dealing with the effect of misconduct is on the whole fragmentary,\(^{216}\) and it is clear that no well-defined policy has been formulated. There is a real need for legislation permitting a wife to convey her lands free of curtesy when she has been deserted or is living apart with sufficient cause.\(^{217}\)

By Divorce. As a general rule, an absolute divorce bars curtesy since it terminates the marriage relationship before the expectancy has matured or the right has accrued.\(^{218}\) Several states, however, have statutes which make the element of fault a consideration and expressly preserve curtesy in cases where the husband secures the divorce because of the wife's misconduct.\(^{219}\) Under such circumstances, the husband's right attaches to lands of which the wife was seised during coverture but not to lands acquired after the decree is granted. In an occasional state, this rule takes the form of accelerating the husband's inchoate interest so that he is entitled to have his estate assigned upon the granting of the decree as if the wife were dead.\(^{220}\) As in the case of dower, an interlocutory decree,\(^{221}\) or one fraudulently obtained,\(^{222}\) or void for lack

\(^{211}\) ILL. ANN. STAT. c. 41, § 15 (1935); KY. REV. STAT. § 392.090 (1948); MO. REV. STAT. ANN. § 337 (1939); W. VA. CODE ANN. § 4114 (1949).
\(^{212}\) MASS. GEN. LAWS c. 209, § 35 (1932); MINN. STAT. § 519.07 (Henderson 1949); N.H. REV. LAWS c. 359, § 18 (1942); W. VA. CODE ANN. § 4114 (1949).
\(^{213}\) N.H. REV. STAT. c. 359, § 18 (1942).
\(^{214}\) E.g., IOWA CODE § 636.47 (1950); N.C. GEN. STAT. ANN. § 52-19 (1950).
\(^{216}\) Such statutes have usually been strictly construed. Cf. Landreth v. Casey, 340 I11. 519, 173 N.E. 84 (1930).
\(^{217}\) See 3 Vernier, American Family Laws 568 (1935).
\(^{218}\) N.C. GEN. STAT. ANN. § 52-19 (1950); W. VA. CODE ANN. § 4718 (1949); Boykin v. Rain, 28 Ala. 332 (1856); Doyle v. Rolwing, 165 Mo. 231, 65 S.W. 315 (1901); Jones v. Kirby, 146 Va. 109, 135 S.E. 676 (1926). As to the effect of divorce on marriage settlements, see Note, 95 A.L.R. 1469 (1935).
\(^{219}\) E.g., ILL. ANN. STAT. c. 41, § 14 (1935); R.I. GEN. LAWS c. 416, § 6 (1938); W. VA. CODE ANN. § 4718 (1949).
of jurisdiction, will not bar curtesy. Since a marriage is not terminated by a divorce a mensa et thoro, curtesy will not be barred thereby.224

VIII. ELECTION OF STATUTORY SHARE

In a large number of American jurisdictions the husband is entitled upon the death of his wife to a statutory share of her property which has none of the characteristics of curtesy but which is very frequently the share of real and personal property to which he would be entitled if she died intestate.225 Usually, such a scheme is found in states (other than community property states) which have abolished all vestiges of curtesy, but in a few states it exists along with curtesy as an alternative which the husband may elect upon his wife's death.226 The statutory provisions in these states differ considerably, but it may be said that, unless the husband has been barred of his right in some manner, his choices are generally three: (1) he may elect to take the interest, if any, which his wife gives him by will; (2) he may renounce such testamentary provision and take the statutory forced share; or (3) he may renounce both the testamentary provision and the statutory share and take curtesy.227 In states where the husband has such a three-fold election, if the wife makes a provision for the husband in her will, he must take affirmative action if he wishes to renounce the will and claim either curtesy or his statutory share.228 The mode of election and the time within which it must be made are generally specified in considerable detail, and the requirements must be closely complied with.229 If the wife makes no provision for the husband in her will, he may elect between curtesy and the statutory share. He is ordinarily not entitled to both,230 and his failure to elect will usually be construed as an election to take the statutory share rather than curtesy.231 Beyond the foregoing,

225. For a summary of such jurisdictions, see 3 Vernier, American Family Laws 535-536, 538-553 (1935).
227. For this triple election, see Newhall, Settlement of Estates and Fiduciary Law in Massachusetts cc. 19-21 (3d ed. 1937).
228. See statutory provisions cited in note 226 supra.
generalization is unsafe because of variations in statutory language, and local statutes should therefore be consulted.

If the husband is entitled to choose among the three alternatives, it may often be difficult to advise him which of the three he should take. Clearly, the nature and provisions of the will, the kind and amount of the assets of the estate, together with the husband's personal circumstances, are among the important factors. There are several further factors, in addition to possible personal preferences, which may affect the husband's choice. For example, the statutory share is nearly always an absolute one, whereas curtesy, unless enlarged by statute, is an estate for life only. Moreover, the statutory share is nearly always subject to creditors' claims, whereas curtesy generally is not, so that the extent of such claims or charges will have to be considered. Since the statutory share frequently includes personalty as well as realty, the character of the wife's estate will also affect the husband's choice, and there may be considerations of estate and income taxes to be kept in mind. Further generalization is unprofitable and might be misleading. Probably under most circumstances it will be unwise for the husband to claim curtesy unless the wife owned considerable real estate and died insolvent or so nearly so that the bulk of the reality must be sold to pay debts and expenses, or unless the wife conveyed during her lifetime substantial amounts of realty without procuring from the husband a release of his protected interest. Probably, today, that situation will rarely arise.

IX. THE INTEREST AFTER WIFE'S DEATH

At common law, if the requisites of marriage, seisin and birth of issue had been complied with, the husband acquired the present life estate known as "curtesy initiate" in his wife's inheritable lands. That interest was said to become "consummate" upon her death if he survived her. Since for nearly all purposes there was no important difference between the incidents of the estates of curtesy initiate and curtesy consummate, the wife's death added little or nothing to the rights and powers which he already had in her lands. No assignment

232. Cases involving the taxability of the husband's interest are collected in Notes, 1916C, L.R.A. 675, 29 L.R.A. (N.S.) 428 (1911). See also CCH INH., EST. & GIFT TAX SERV. ¶¶ 3400-3405.
234. Co. LITI. § 30a.
235. See note 4 supra.
236. During the wife's lifetime his interest was subject to being defeated by divorce. See Mattocks v. Stearns, 9 Vt. 326 (1837).
of the consummate interest was necessary, as in the case of the widow's dower, since the husband's estate extended to all, rather than a fraction, of the lands of which his wife had had the requisite seisin.\textsuperscript{237}

As emphasized elsewhere in this article, curtesy initiate as a present estate has been done away with in the United States, either indirectly as a result of the so-called Married Women's Acts,\textsuperscript{238} or directly as a result of statutes abolishing all vestiges of curtesy.\textsuperscript{239} In jurisdictions which still retain curtesy in some form after the wife's death, the husband generally has during marriage a protected expectancy which is similar to inchoate dower and which arises when the requisites of curtesy have been complied with.\textsuperscript{240} If the expectancy is not barred in some manner during coverture, it matures upon the wife's death and loses its contingent character. At that time the husband is entitled either to possession of the lands subject to curtesy or to have his rights therein ascertained and set off in an appropriate action. Because of the modifications of common law curtesy which have taken place in most states, some procedure analogous to assignment of dower is necessary in order to set off the husband's share,\textsuperscript{241} and in most of those states the statutes governing the assignment of dower are applicable to the assignment of the husband's share.\textsuperscript{242} It should be noted that the husband is generally not entitled to an interest analogous to the widow's quarantine pending the assignment of his estate.\textsuperscript{243} However, under a statute providing that the law of dower is applicable to the law of curtesy it has been held that the husband may occupy the mansion house and curtilage until his curtesy has been assigned,\textsuperscript{244} and it may therefore be that in the few states having similar statutes the husband has a right similar to quarantine.\textsuperscript{245}

\begin{footnotes}
\item[237] See 1 \textsc{Cruise}, \textsc{Real Property} 167 (Greenleaf ed. 1856).
\item[238] Cases involving the effect of these statutes are collected in Notes, 14 A.L.R. 355 (1921), 29 id. 1338 (1924).
\item[239] See 3 \textsc{Vernier}, \textsc{American Family Laws} 538-553 (1935).
\item[240] See note 14 \textit{supra}.
\item[241] Ill. \textsc{Ann. Stat.} c. 41, § 18 (1935); Ky. \textsc{Civ. Code Ann.} § 499 (Carroll, 1948); N.J. \textsc{Rev. Stat.} §§ 3:38-1 \textit{et seq.} (1937); W. Va. \textsc{Code Ann.} § 4107 (1949). See generally, 3 \textsc{Vernier}, \textsc{American Family Laws} 572 (1935).
\item[242] No provisions relating to assignment are found in four states—Delaware, New Hampshire, Rhode Island, and Tennessee—which still recognize curtesy consummate essentially as at common law.
\item[243] 
\item[244] Huffman v. Huffman, 57 Ohio App. 33, 11 N.E.2d 271 (1937). Since at common law the husband's curtesy interest was a present estate in the wife's lifetime and no assignment was necessary upon her death, there was no need to make provision for him pending assignment.
\item[245] See, \textit{e.g.}, Mo. \textsc{Rev. Stat. Ann.} § 319 (1939); \textsc{Ore. Comp. Laws Ann.} §§ 17-118, 401 (1940).
\end{footnotes}
When curtesy has been assigned or otherwise set apart to the husband, he has an immediate freehold estate in the lands so set apart. In most jurisdictions his interest therein is a life estate, and in general all the incidents of a life estate attach to his tenancy. He is entitled to the rents and profits like any life tenant and can maintain trespass or ejectment to protect his interest. Easements and other rights appurtenant to the land pass with it, and the husband takes subject to defects in his wife's title and to paramount encumbrances. He may freely transfer or encumber the property to the extent of his interest, but he may not commit waste. The interest may be sold on execution for his debts. In most jurisdictions he is under a duty to make repairs in order to prevent the deterioration of the improvements on the land, and he is liable for taxes assessed against the property. Although the widower will not forfeit his estate for crime, he may be deprived of it in some states for committing waste or for failure to pay taxes. In several states if the husband

248. Decker v. Decker, 205 Ky. 69, 265 S.W. 483 (1924); Miller v. Proctor, 330 Mo. 43, 49 S.W.2d 84 (1932).
249. Costello v. Grand Trunk Railway, 70 N.H. 403, 47 Atl. 265 (1900). The husband is usually held to have an insurable interest in the premises. Cases are collected in Note, 68 A.L.R. 362, 365 (1930).
250. Roper, Husband and Wife *35.
251. See III and IV supra.
is lawfully evicted from the lands assigned him, he will be entitled to a new assignment or to other compensation. When he dies, the land devolves on the person or persons owning the reversion, and all the incidents of his estate then terminate. Crops growing on the land, however, pass with his personal estate.

In jurisdictions where the husband is entitled to an absolute interest in his wife's lands by way of curtesy, he is entitled to the enjoyment of all the incidents appurtenant to such an interest, and on his death the property will pass to those entitled to take under his will or under the applicable intestate laws.

261. But see Symmes v. Drew, 21 Pick. 278 (Mass. 1838) (easement appurtenant to land assigned as dower held to continue after wife's death).
263. See 3 id. at 538-553.